to the lessee's pardonable mistake.[15] The court sometimes stretches this rather far to relieve in a hard case; but it is clear that mere forgetfulness cannot be considered mistake.[16] In these cases, also, it is a necessary prerequisite to the lessee's relief that the lessor can be properly compensated. Again, as a general rule, if the breach was caused by the lessor's fraud, or if he even innocently justified the lessee in believing that certain conditions in the lease were waived, so that the lessee in reliance on the supposed waiver broke his covenant, or if in general the lessor's conduct makes it unconscionable for him to take advantage of the breach, equity will relieve against the forfeiture.[17]

THE IDENTITY OF CRIMINAL OFFENSES. — It is a fundamental principle of criminal law that no one shall be twice put upon trial for the same offense. To prove identity, it is necessary to show that the offenses are the same in fact and in law.[1] Two exactly similar indictments may charge two distinct offenses in fact, and it is for the jury to determine by a comparison of the evidence whether identity exists. The more difficult problem is to determine whether the two offenses are the same in law. They may be distinct from each other, yet if both include the same offense they may give rise to double jeopardy. Thus, if one is equal to the other plus some new criminal element, or if they respectively equal the same crime plus a different criminal element, and if on a trial for either the merits of the common crime are passed on, such trial necessarily bars trial for the other.[2] A well-settled exception is that a conviction for battery will not bar a subsequent trial for homicide if the victim dies in the meantime.[3] The reasons given are unsatisfactory. As battery is an important element of homicide, a punishment for both offenses would clearly be a double punishment for the battery.

Offenses may be distinct because different in nature or in species, so that each is substantially a separate injury to the state. If no one criminal element is a necessary ingredient of both offenses, it is clear that the injury to the state is double.[4] Because the same evidence may be used to prove both offenses, it does not of necessity follow that the crimes are identical. Thus, one and the same act may be a violation of divers statutes, — as selling liquor without a license, selling liquor on Sunday, and selling liquor to a minor.[5] In a recent case under the Sherman Anti-Trust Act,[6] the defendant was convicted on two counts, one of which charged a combination in restraint of interstate commerce, and the other an attempt to monopolize a part of interstate commerce. The same evidence was used in support of both counts, and the defendant objected that but one offense was charged. Each offense, however, could be committed without committing the other. The first count charged merely the formation of a combination for the pur-

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15 Mactier *v.* Osborn, 146 Mass. 399.

16 Barrow *v.* Isaacs, *supra.*

17 Hughes *v.* Metropolitan Ry. Co., 2 App. Cas. 439; Thropp *v.* Field, 26 N. J. Eq. 82; Lilley *v.* Fifty Associates, 101 Mass. 432.

1 Com. *v.* Roby, 29 Mass. 496.

2 Hans Nielsen, Pet., 131 U. S. 176.

3 Rex *v.* Morris, 10 Cox C. C. 480; State *v.* Littlefield, 70 Me. 452

4 See Harrison *v.* State, 36 Ala. 248.

5 *Cf.* Com. *v.* Vaughan, 101 Ky. 603; Smith *v.* State, 105 Ga. 724.

6 26 Stat. at L. 209.

pose of restraining interstate commerce. Though that act might of itself create a monopoly, it might also be so far from achieving that end as to be mere preparation, which is not enough to constitute a legal attempt. The attempt to monopolize obviously need not include the element of combination. Consequently, the objection on the ground of double jeopardy was overruled. *United States* v. *MacAndrews and Forbes Co.*, 149 Fed. Rep. 836 (Circ. Ct., S. D. N. Y.).

A futile attempt was made to place the above case in that class where one transaction is improperly split up into several crimes of the same kind. Thus, if a man in one transaction steals goods belonging to several different owners, it is possible to form several indictments, each charging the theft of a different article owned by a different person. The ordinary test of identity of offenses — whether the facts necessary to support the first indictment would warrant a conviction under the second — would not prevent a conviction under each indictment. And that is the result reached by some courts.[7] But it is clear that the state has been injured but once; and where there is only one transaction and one injury to the state, the offenses are identical within the meaning of the double jeopardy guaranty.[8]

PREVENTION OR HINDRANCE BY PROMISEE AS AN EXCUSE FOR NON-PERFORMANCE. — The performance of a contract may be prevented or hindered by the promisee's failure to supply co-operation agreed upon, or by his active interference, intentional or unintentional. Where the promisor's ability to perform depends on some positive act of the promisee, necessary as a prerequisite, the latter's breach of the agreement to co-operate actively so absolutely prevents performance that the defense might well be called impossibility, if the confusing applications of this term had not made use of it objectionable.[1] Clearly the promisor's non-performance should here be excused, whether the promisee's agreement actively to co-operate be express[2] or implied.[3] On the other hand, even when the promisee is under no such obligation, his passive co-operation may be an important element, and if he prevents, hinders or harasses the attempted performance of the promisor, in many situations he may not be entitled to succeed in an action for non-performance. A general theory of defense applicable to this alternative case, however, can be satisfactorily established neither by implying a promise on the part of the promisee to refrain from interfering with the promisor's performance, nor by merely allowing so-called impossibility to excuse.

Should the promisor expressly or impliedly, as in dealings on the stock exchange, assume the risk of absolute prevention[4] or hindrance[5] of performance by the promisee, he should, of course, have no defense in the event of such interference. But usually the promisor assumes no such risk.

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[7] Reg. *v.* Brettel, C. & M. 609.
[8] Hoiles *v.* U. S., 3 MacArthur (D. C.) 370.

[1] *Cf.* 19 HARV. L. REV. 462.
[2] McKee *v.* Miller, 4 Blackf. (Ind.) 222.
[3] Murphy *v.* Black, 78 Mo. App. 316; Atchinson *v.* Williams, 28 Tex. 599; Mackay *v.* Dick, 6 App. Cas. 251, 263.
[4] See Chicago, etc., Ry. *v.* Hoyt, 149 U. S. 1, 14, 15; Dolan *v.* Rodgers, 149 N. Y. 489, 491.
[5] *Cf.* Murdock *v.* Caldwell, 10 Allen (Mass.) 299.